

## DISTRICT OF NEVADA

Case No. 2:21-cv-00012-JAD-DJA

Christian Kyle Vidal,

Petitioner

V.

## Order Dismissing Habeas Action

U.S. Immigration and Customs Enforcement,

Respondent

Christian Kyle Vidal filed this 28 U.S.C. § 2241 petition for a writ of habeas corpus, challenging his continued detention by U.S. Immigration and Customs Enforcement pending enforcement of his final removal order.<sup>1</sup> On February 10, 2021, I ordered him to show cause in writing why the petition should not be dismissed for failure to exhaust administrative remedies.<sup>2</sup> Because Vidal acknowledges in his response that he has not exhausted his remedies, I dismiss his petition without prejudice.

Noncitizens detained under either 8 U.S.C. § 1226(a) (which applies to noncitizens who are detained pending entry of a final order or while their petitions for review of their removal orders are pending) and § 1231(a)(6) (which applies to noncitizens such who are detained after entry of final removal order and conclusion of all administrative review) are generally required to exhaust substantive challenges to their removal proceedings as well as bond determinations.

<sup>1</sup> ECF No. 1-1.

<sup>2</sup> ECF No. 3.

1 Vidal explains that an Immigration Judge (IJ) entered an order of removal against him on  
2 March 12, 2020.<sup>3</sup> It appears that he waived appeal, so the order became a final order of removal  
3 on that date. Generally, the Attorney General is required to remove the noncitizen within 90  
4 days, known as the “removal period.”<sup>4</sup> Vidal indicates that the IJ declined to release him on  
5 bond and informed him of his right to appeal that determination to the Board of Immigration  
6 Appeals (BIA). It appears that he did not appeal because he was told that he would be deported  
7 within a month if he did not pursue an appeal. However, respondent has detained him beyond  
8 the 90-day removal period and for more than one year after the entry of the final order of  
9 removal. He is, therefore, currently detained under 8 U.S.C. §1231(a)(6), which provides that  
10 certain categories of aliens who have been ordered removed, including criminal aliens and any  
11 alien who has been determined by the Attorney General to be a risk to the community or unlikely  
12 to comply with the order of removal, “may be detained beyond the removal period and, if  
13 released, shall be subject to the terms of supervision in paragraph (3).” Now, instead of  
14 appealing his continued detention to the BIA, he has filed this § 2241 petition in federal district  
15 court.

16 An IJ loses jurisdiction to redetermine bond when an order of removal becomes  
17 administratively final.<sup>5</sup> The Ninth Circuit has held that authorization for detention under 8  
18 U.S.C. § 1226(c), INA § 236(c), ends when the Board of Immigration Appeals affirms the  
19 removal order.<sup>6</sup> “Thereafter, the Attorney General’s detention authority rests with [the general  
20 discretionary authority to detain under § 1226(a), INA § 236(a)] until the alien enters his

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22 <sup>3</sup> ECF No. 4 at 1.

23 <sup>4</sup> 8 U.S.C. §1231(a)(1)(A).

<sup>5</sup> 8 C.F.R. § 1236.1(d).

<sup>6</sup> *Casas-Castrillon v. DHS*, 535 F.3d 942 (9th Cir. 2008).

1 ‘removal period,’ which occurs only after we have rejected his final petition for review or his  
2 time to seek such review expires.”<sup>7</sup> The Ninth Circuit has further ruled that “the government  
3 may not detain a legal permanent resident . . . for a prolonged period without providing him a  
4 neutral forum in which to contest the necessity of his continued detention.”<sup>8</sup> DHS bears the  
5 burden of establishing that continued detention is warranted.<sup>9</sup>

6 In *Diouf v. Napolitano (Diouf II)*, the Ninth Circuit held that prolonged detention under 8  
7 U.S.C. § 1231(a)(6) is prohibited without an individualized hearing to determine whether the  
8 person is a flight risk or a danger to the community.<sup>10</sup> Because prolonged detention without a  
9 hearing presents serious due-process concerns, and the statute did not plainly authorize such  
10 detention, the court construed § 1231(a)(6) to require a custody hearing before an immigration  
11 judge where detention has lasted six months.<sup>11</sup> The government is required to show by clear and  
12 convincing evidence that detention is necessary to prevent flight and danger.<sup>12</sup> In *Jennings v.*  
13 *Rodriguez*,<sup>13</sup> the U.S. Supreme Court underlined that, in contrast to the other general  
14 immigration detention statutes, § 1231(a)(6) may be construed to limit prolonged detention, as  
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18 <sup>7</sup> *Id.* at 948.

19 <sup>8</sup> *Id.* at 949 (establishing so-called *Casas* hearings).

20 <sup>9</sup> See *Singh v. Holder*, 638 F.3d 1196 (9th Cir. 2011).

21 <sup>10</sup> *Diouf v. Napolitano (Diouf II)*, 634 F.3d 1081 (9th Cir. 2011).

22 <sup>11</sup> *Diouf II*, 634 F.3d at 1086. The court further reasoned that “[t]he regulations do not afford  
adequate procedural safeguards because they do not provide for an in-person hearing, they place  
the burden on the alien rather than the government and they do not provide for a decision by a  
neutral arbiter such as an immigration judge.” *Id.* at 1091.

23 <sup>12</sup> *Flores Tejada v. Godfrey*, 954 F.3d 1245, 1249 (9th Cir. 2020).

<sup>13</sup> *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018).

1 the Ninth Circuit did in *Diouf II*.<sup>14</sup> Thus, individuals subject to prolonged detention under §  
2 1231(a)(6) in the Ninth Circuit should continue to receive custody hearings.

3 In *Rodriguez v. Robbins*, the Ninth Circuit stated that all noncitizens, even those subject  
4 to mandatory detention, are allowed to request a bond hearing after they have been detained for  
5 six months or more pending removal proceedings.<sup>15</sup> If noncitizens who are held in custody  
6 under 8 U.S.C. §§ 1226(a) or 1231(a)(6)—the provision at issue in this case—are dissatisfied  
7 with the IJ’s bond determination, they may file an administrative appeal so that “the necessity of  
8 detention can be reviewed by . . . the [Board of Immigration Appeals] (BIA).”<sup>16</sup> If they remain  
9 dissatisfied, they may file a petition for habeas corpus in the district court.<sup>17</sup>

10 Vidal only states that he failed to exhaust his process because he cannot afford a lawyer  
11 and because he viewed faster deportation as preferable to prolonged immigration detention.  
12 While the court is not unsympathetic to these considerations, the fact remains that Vidal’s  
13 petition is unexhausted. Moreover, Vidal now advises the court that he has in fact filed a motion  
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15 <sup>14</sup> See *Ramos v. Sessions* (“*Ramos II*”), 293 F. Supp. 3d 1021, 1026 (N.D. Cal. 2018) (“*Jennings* .  
16 . . . left untouched the Ninth Circuit’s requirement of such hearings for immigrants detained under  
section 1231(a)(6).”).

17 <sup>15</sup> *Rodriguez v. Robbins*, 804 F.3d 1060 (9th Cir. 2015).

18 <sup>16</sup> *Prieto–Romero v. Clark*, 534 F.3d 1053, 1059 (9th Cir. 2008); see 8 C.F.R. 236.1(d)(3) (before  
order of removal); 1236.1(d)(3) (after order of removal) (noncitizen may appeal to the BIA an  
IJ’s custody and bond determination).

19 <sup>17</sup> See, e.g., *Leonardo v. Crawford*, 646 F.3d 1157, 1160 (9th Cir. 2011) (petitioner “pursued  
20 habeas review of the IJ’s adverse bond determination before appealing to the BIA. This short cut  
was improper. Leonardo should have exhausted administrative remedies by appealing to the BIA  
21 before asking the federal district court to review the IJ’s decision”); *Alvarado v. Holder*, 759  
F.3d 1121, 1127 n.5 (9th Cir. 2014) (issue exhaustion is a jurisdictional requirement); *Sola v.*  
22 *Holder*, 720 F.3d 1134, 1135–36 (9th Cir. 2013) (declining to address a due process argument  
that was not raised below, which could have been addressed by the agency); *Singh v. Holder*,  
23 638 F.3d 1196, 1200–03 (9th Cir. 2011); *Tijani v. Holder*, 628 F.3d 1071, 1080 (9th Cir. 2010)  
(no jurisdiction to review legal claims not presented in the petitioner’s administrative  
proceedings before the BIA).

1 for a custody redetermination hearing with the immigration court in Las Vegas, thus he appears  
2 to be pursuing his administrative remedies.<sup>18</sup> The outcome of that motion may render this  
3 petition moot.

4 IT IS THEREFORE ORDERED that the Clerk of Court is directed to DETACH AND  
5 FILE the petition (ECF No. 1-1) and CLOSE THIS CASE.

6 IT IS FURTHER ORDERED that **the petition is DISMISSED without prejudice as**  
7 **unexhausted.**

8 IT IS FURTHER ORDERED that a certificate of appealability is denied because jurists  
9 of reason would not disagree with this conclusion.

10 Dated: July 12, 2021

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12 U.S. District Judge Jennifer A. Dorsey  
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<sup>18</sup> ECF No. 4 at 9.